DOCKET FILE COPY ORIGINAL

RECEIVED

JUN 17 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Sections of	)	MM Docket No. 92-266
the Cable Television Consumer	)	
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION
ON FURTHER NOTICE OF PROPOSED RULEMAKING

The United States Telephone Association (USTA) respectfully submits these comments on the Commission's Further Notice of Proposed Rulemaking (FNPRM)

additional changes to its database, and what might be the resulting modifications to its conclusions regarding rate differentials and reasonable rates.

I. THE COMMISSION CAN MEET ITS STATUTORY DUTIES TO TAKE INTO ACCOUNT OR TO CONSIDER LOW PENETRATION CABLE SYSTEMS WHILE DECLINING TO GIVE THEM ANY WEIGHT IN ITS BENCHMARK RATE ANALYSIS.

USTA believes that, in the absence of a statutory provision, the Commission normally should presume it should exclude from its database the rate samples from those systems that are not sufficiently representative of competitive rates as to contribute to the rate regulation benchmark. The structure of the 1992 cable statute, however, includes three complicating provisions, §§ 623(b)(2)(c), 623(c)(2) and 623(l). The first two provisions direct the Commission to "take into account" and to "consider" the rates for those cable systems that are subject to effective competition when addressing the reasonableness of cable rates. The latter provision defines "effective competition." Low penetration cable systems are addressed within the definition of effective competition set out in § 623(l).

The overriding conclusion that can be drawn from the data on these low penetration cable systems is clear - they are not systems that face any effective competition, because their rates are not low and because their low penetration comes from other factors. The questions raised by the FNPRM, then, must be evaluated and addressed mainly so that the Commission will comply with the statute when it acts on this overriding conclusion.

The Commission was given a charge by the Congress to evaluate and set criteria for determining reasonable rates, as defined by § 623(b) and (c) of the Act. The statutory factors can include, but are not governed by the rates for systems that face effective competition within the definition contained in § 623(l) of the Act.

Appendix E to the Report and Order indicates that there would be 62 qualifying comparative systems if the low penetration cable systems were excluded, and 141 if the low penetration cable systems were not excluded. Report and Order, Appendix E, at ¶ 11. The Commission's sampling process was extensive and served the purposes of the statute. One can already conclude that the low penetration cable systems have been "considered," or "taken into account," in the Commission's activities. The Commission's current FNPRM should not afford the data from these systems more value than they deserve in setting the benchmark rate. it is clear that they deserve no weight in that process.

It is clear that the low penetration cable system samples simply are not representative of competitive market forces. Thus, they deserve no further consideration and, indeed, should be accorded no weight by the Commission in setting the benchmark rate. Whether these data remain in the Commission's database for information purposes is not really at issue. The Commission has satisfied its statutory obligation by "considering" this data, and "taking it into account," and should afford it no influence in the calculation of the benchmark rate. In contrast, giving this data any weight would be inconsistent with the intent

of the statute, because the Commission would be using data clearly based on noncompetitive circumstances. The Commission should decline to afford any weight to these systems in its analysis under § 623(b) and (c).

II. THE RATE BENCHMARK SHOULD BE ADJUSTED DOWNWARD BECAUSE DATA ON LOW PENETRATION CABLE SYSTEMS SHOW THESE SYSTEMS TO HAVE HIGH RATES, NOT COMPETITIVE RATES, WHICH HAVE UNREASONABLY RAISED THE LEVEL OF THE CURRENT BENCHMARK ABOVE THE COMPETITIVE LEVEL THE STATUTE CONTEMPLATES.

As a general rule, low penetration cable systems automatically will generate questions about the representativeness of those systems in comparison with other cable systems. This is so because most cable systems have penetration well in

Only two factors suggest that low penetration and low rates can be synonymous, competition being the first one, and market anomalies being the other. The Commission FNPRM, however, indicates that in the absence of these low penetration cable system rate samples, the difference between its competitive benchmark and current rates would increase, and increase significantly, to 28%. FNPRM at ¶ 561. In other words, the benchmark rate would go down. This impact shows that the low penetration cable systems' rates actually are substantially higher than what a competitive rate should be, and these rates are pushing the benchmark rate up. These low penetration cable system rates cannot be a result of competition or competitive force. Because they are higher, they must be the result of one of the four factors listed in the preceding paragraph, or a comparable cause. Under these circumstances, the Commission should afford these systems no weight in its consideration of the various factors set out in §§ 623(b) and (c).

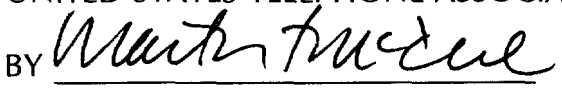
A new and significantly lower benchmark is appropriate as a result. In turn, a requirement for further reductions of cable rates also is appropriate. This would be consistent with the results of the various studies filed by USTA in the Commission's cable television proceedings in Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, and Competition Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600. Those USTA studies proved that the cable industry maintains an egregiously high *q ratio* for its cable systems, based upon a thorough comparison of cable system market values

and cable system replacement costs. A reduction in *q ratios* can occur if rates are reduced under the FNPRM, because lower rates can reduce monopoly rents, and in turn can help to constrain the unnecessarily high numerator in the *q ratio* equation. USTA's studies were taken into account in the crafting of the new statute. See S. Rep. No. 102-92 to accompany S.12, 102d Cong. 1st Sess. (1991) at 10. Commission action to set a lower benchmark and to further reduce rates would be consistent with these studies and also would be consistent with the statutory requirements of § 623. The statute expects that high, noncompetitive rates will not be used to prop up any competitive pricing benchmark.

In conclusion, USTA advocates affording the low penetration cable system rate samples no weight in the Commission's benchmarking process, based upon the absence of competitive rate effects shown in the sampling.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

BY 

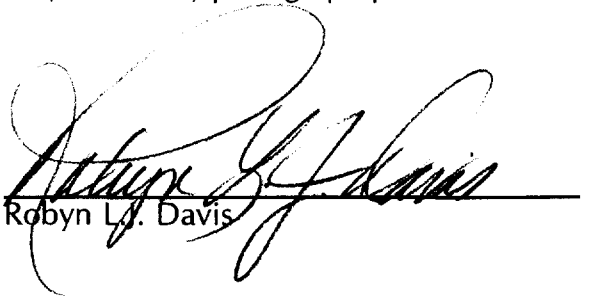
Martin T. McCue
Vice President & General Counsel
U.S. Telephone Association
900 19th St., NW Suite 800
Washington, DC 20006-2105
(202) 835-3114

June 17, 1993

G:\LEGAL\MTM\93A\93266FNC

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on June 17, 1993 copies of the Comments on Further Notice of Proposed Rulemaking of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



Robyn L.J. Davis

James R. Hobson
Jeffrey O. Moreno
Donelan, Cleary, Wood & Maser, P.C.
1275 K Street, NW
Suite 850
Washington, DC 20005

Charles Nitzschker
7440 NW 35th Street
Lauderhill, FL 33319

Cristina Frechette
11203 NE 9th Court
Biscayne Park, FL 33161

Lyle W. Hanks
Mayor
City of St. Louis Park
5005 Minnetonka Boulevard
St. Louis Park, MN 55416

Larry Silver
Collega Art Assn.
275 Seventh Avenue
New York, NY 10001

James R. Pearson
City of Manhattan
1101 Poyntz
Manhattan, KS 66502

Arthur R. Harding
Fleischman and Walsh
1400 16th Street, NW
Washington, DC 20036

Joan D. O'Connor
144 East Blue Heron Drive
Salem, SC 29676

Raphael Oquendo
11428 SW 74th Street
Miami, FL 33173

Michael P. Moore
New England Foundation for the Arts
678 Massachusetts Avenue
Cambridge, MA 02139

Paul Glist
James F. Ireland
Steven J. Horvitz
Theresa A. Zeterberg
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Patrick L. Willis
City Attorney
817 Franklin Street
P.O. Box 1597
Manitowoc, WI 54221

Charles S. Walsch
Stuart F. Feldstein
Fleischman and Walsh
1400 16th Street, NW
Washington, DC 20036

R. Bruce Beckner
Stuart F. Feldstein
Fleischman and Walsh
1400 16th Street, NW
Washington, DC 20036

Dick Glass
President
Satellite Dealers Assn.
602 N. Jackson
Greencastle, IN 46135

Gardner F. Gillespie
Christopher P. Gilkerson
Hogan & Hartson
555 13th Street, NW
Washington, DC 20004

Paul Rodgers
Charles D. Gray
James Bradford Ramsay
NARUC
1102 ICC Building
P.O. Box 684
Washington, DC 20044

William F. Adler
Pacific Telesis
1275 Pennsylvania Avenue, NW
Suite 400
Washington, DC 20004

Ben M. McMakin
City of Bandon
P.O. Box 67
Bandon, OR 97411

Donna Coleman Gregg
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Christopher B. Faer
E! Entertainment TV, Inc.
5670 Wilshire Blvd.
Los Angeles, CA 90036

Jud Colley
Community Broadcasters Assn.
P.O. Box 191229
Dallas, TX 75219

Janice L. Lower
Michael R. Postar
Duncan, Weinberg, Miller & Pembroke
1615 M Street, NW
Suite 800
Washington, DC 20036

Albert E. Clark
Chesapeake Regulatory Consultants, Inc.
450 Maple Avenue East
Suite 202
Vienna, VA 22180

Simmons Communications
One Landmark Square
Suite 1400
Stamford, CT 06901

Martin Firestone
Leibowitz & Spencer
Suite 1450
Amerifest Building
One Southeast Third Avenue
Miami, FL 33131

James Pappas
13835 South 84th Avenue
Orland Park, IL 60462

Dr. Manuel M. Lopez
Mayor
300 West Third Street
Oxnard, CA 93030

Cameron F. Kerry
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111

Paul R. Cianelli
Thomas K. Steel, Jr.
William D. Durand
New England Cable TV Assn.
100 Grandview Road
Suite 201
Braintree, MA 02184

Robert M. Silber
National Captioning Institute, Inc.
5203 Leesburg Pike
15th Floor
Falls Church, VA 22041

Robert W. Sterrett, Jr.
Thompson T. Rawls II
BellSouth Telecommunications, Inc.
Suite 4300 Southern Bell Center
675 West Peachtree Street, NE
Atlanta, GA 30375

International Transcription Service
2100 M Street, NW
Suite 140
Washington, DC 20036